FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1978

No. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents
(Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

25 U. S. C. 194 is not applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States Government.

The Brief on the Merits of these petitioners (No. 78-161, State of Iowa, State Conservation Commission of

the State of Iowa) made the point that the term "a white person" as used by 25 U. S. C. 194 does not include the sovereign states of the union. This conclusion follows from the ordinary and natural sense of the language, from judicial constructions of similar language—constructions at and around the time of the drafting of this section and in more modern cases—, and from both a reading of the whole act of which the section *sub judice* is a part and acts *in pari materia*. No. 78-161, Iowa, Br. 12-14. Iowa also pointed out that reading "a white person" as exclusive of the sovereign states of the union is consistent with this Court's decisions in other contexts, *Id.* 14 and 17 n. 6, and consistent with this Court's practice of avoiding statutory construction of doubtful constitutionality, *Id.*[1]

The Omaha Indian Tribe's brief, with one exception, never really addresses Iowa's argument that "a white

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1 The Brief for the United States argues that "to interpret 'white person' to mean Caucasian (would discriminate between Caucasian and other non-Indians and therefore) would raise serious doubts about the constitutionality of Section 194, which can and should be avoided by construing the term to mean non-Indian." United States, Br. 39. Whatever the merits of that proposition, the United States fails to point out that no such problem is created by confining the scope of the term "white person" to entities other than the states of the Union. Throughout its brief, the United States makes the erroneous suggestion that the leap from "white person" to sovereign states of the Union is no greater than the leap from "white person" to individual non-Indians, or even individual non-Indians and their business organizations. It ignores the fact that its suggested constitutional problem is as easily avoided by a construction which does not include the states. In fact, as Iowa has asserted, it is the construction of the statute to include the State which raises the constitutional problems, i. e., federalism (and comity). No. 78-161, Iowa, Br. 15.

person" does not include the State of Iowa. The single exception is the Tribe's suggestion that without that sort of expansive reading, the states of the union will defeat the purpose of the act by engaging in transfers of land from white persons to the states in order to defeat the rights of Indians. Omaha Indian Tribe, Br. 75, 84 (defeating Section 194 "by the simple transfer of title to the State of Iowa").

That suggestion is completely without basis in fact and completely unwarranted. There is no indication that Iowa or any other state will engage in land transfers to defeat the rights of Indians. The state is not in the business of defeating the rights of parties to land disputes. There is no evidence that they have done or will do so, that Congress was concerned that they would do so, or that the people of Iowa, or of any other state, would stand for them doing so. There is nothing in Section 194 which suggests a policy decision to put the burden of proof on a sovereign state when an Indian challenges the state's ownership of land.

If the Tribe is suggesting collusion between the white person and the State, there is no indication that "a white person" is going to be any more anxious to turn loose of land when the grantee is a state than when the grantee is an Indian. In any event, such a course of action designed to defeat the rights of Indians could certainly be dealt with as intentional racial discrimination on the part of the state.

The Brief for the United States argues a Congressional policy to protect Indians against the loss of their lands to non-Indians rather than just "white persons."

United States Br., *passim*, including 32, 37. The brief adds no arguments to that presented by the Omaha Indian Tribe of a Congressional policy to protect Indians against the states of the Union. United States Br. 41-44.

The Solicitor General's brief argues that

> "if the private non-Indian owner had retained the claim to the land, and an Indian claimant had made out a presumption of title, Section 194 would have required the non-Indian claimant to carry the burden of proof. But, under petitioners' theory, if the state acquired its claim from the non-Indian—and presumably took no better claim than its grantor had—Section 194 would not apply as between the Indian claimant and the state."

Id. at 43.

That latter characterization of Iowa's position, "if the State acquired its claim from the non-Indian . . . Section 194 would not apply as between the Indian claimants and the state," is correct. It is also true that Section 194 would not apply as between two Indian claimants, one of whom had acquired his claim from "a white person," even though the second Indian acquired his interest under this same cloud on his title, suggested by the United States.[2]

The United States argues in addition that "a review of the other provisions of the (act) and its predecessor

2 The latter is true, that is, unless the Tribe and the United Sates would have this Court read "a white person" to mean all non-Indian claimants regardless of their race or their status as "persons," plus some Indians. The United States, at least, seems not to make that argument. See United States, Br. 32, n. 25.

reveals that Congress used the phrase white person in contexts where it plainly referred to all non-Indians." United States, Br. 32-33. They then cite and discuss a number of sections of the act. Whatever those sections indicate about extending the reach of the term "white person," not a single one "plainly" refers to the state. On the contrary, a great many of the term's uses "plainly" and necessarily are *not* meant to include states. *Id.* and No. 78-161, Br. 13-14.

Iowa does not argue that "person" cannot include states, only that ordinarily, and in this instance, it does not. No. 78-161, Iowa, Br. 12-14. The United States cites four cases in which this court has interpreted the statutory term "person" to include states. United States, Br. 42. In two of these, *Hawaii v. Standard Oil Company*, 405 U. S. 251, 261 (1972) and *Georgia v. Evans*, 316 U. S. 159 (1942), the federal statutes involved, the Clayton Act and the Sherman Antitrust Act respectively, were expansive, and not restrictive, of the rights of the states. The states sought such an interpretation and infringement of states' rights was not involved. The other two, *Sims v. United States*, 359 U. S. [illegible] (1959) and *Ohio v. Helvering*, 292 U. S. 360 (193[illegible] the general rule in the interpretation of "[illegible]venue measures" that "statements of general application" are "operative in the case of state activities." *Sims v. United*

3 Compare *Parker* v. *Brown*, 317 U. S. 341 (1943), where this Court, one year after finding that states were "persons" for purposes of bringing suit under the Sherman Antitrust Act, *Georgia* v. *Evans*, 316 U. S. 159 (1942), found that they were not "persons" for purposes of violating the Act. *Parker* v. *Brown, supra*, 317 U. S. at 351.

States, supra, 359 U. S. at 112. In each of the four cases this Court found a Congressional intent to read "person" to include a state. As noted above, and in our initial brief, at 12-14, no such intent is present here.

II.

The Court of Appeals decision violates established principles of federalism.

A. The issues raised by the State of Iowa are properly before the Court.

The Omaha Indian Tribe dismisses the State of Iowa's second argument with the facile assertion that it does not address the issue presented in its petition for certiorari, and, accordingly, "The Tribe is proceeding on the basis that the issue of Iowa's title is no longer before the Court." Omaha Indian Tribe, Br. 28-29, 79-83.

Assuredly, point 4 of "Questions presented for review" in Iowa's petition for certiorari refers to "Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."[4] But the heading of the discussion of that issue, under "Reasons for granting the writ" states, "4. The Court of Appeals decision violates established principles of Federalism."[5] This is identical to the heading of Point II of Iowa's brief on the merits. No. 78-161, Iowa, Br. 18. Moreover, the argument presented in Point II of Iowa's brief is fairly encompassed within its discussion of the

4 Petition, No. 78-161, p. 3.

5 *Id.,* p. 11.

"Reasons for granting the writ" contained in point 4 of its petition.

Surely, this Court's Rule 40 does not supply the Tribe with an adequate reason for "proceeding on the basis that the issue of Iowa's title is no longer before the Court."[6]

Likewise, the Tribe avoids the merits of arguments presented by Iowa and 44 other sovereign states of the United States concerning their ownership of the beds of navigable rivers within their boundaries with the bare assertion that Iowa "offered no evidence in support of its claims", and, "Iowa adopted *en toto* the very extensive evidence offered by Petitioners Wilson, Lakin and Jackson." Omaha Indian Tribe, Br. 80, 86-88. Of course it is immaterial that in a trial involving multiple parties and multiple counsel, that one attorney elicits oral testimony on behalf of all. And the exhibits themselves show that much of the land in dispute arose as bars, islands and other accretions to the bed of the Missouri River. The fact that Iowa also accepted quit claim deeds from Lakin and Peterson, who were private riparian owners, and relied in part upon these deeds at the trial of the case, does not deprive it of the equally valid claim based upon its ownership of the bed of the River.

It is worthy of note that *Bonelli Cattle Co. v. Arizona,* 414 U. S. 313 (1973) was the prevailing law on this point at the time of trial. Had this Court's decision been rendered in *Oregon v. Corvallis Sand & Gravel Co.,* 429

6 Rule 40 (1) (d) (2) states in pertinent part, "The phrasing of the questions presented need not be identical with that set forth in . . . the petition for certiorari . . ."

U. S. 363 (1977) at that time, the emphasis of Iowa's case might have been different. But, concededly, from the beginning of these proceedings, Iowa has claimed the land in issue in part upon the basis of its ownership of the bed of the River. Omaha Indian Tribe, Br. 33-34; App. pp. 90-93, 152-155. And if the exhibits show anything, it is that much of the land claimed by Iowa arose from the bed of the River.

It is respectfully submitted that the issues raised in the second point of Iowa's brief are properly before this Court.

B. Local law, and not "federal common law" should be applied to determine the issues of this case.

The Brief for the United States addresses itself to the more pertinent question of whether the facts of this case require application of "federal common law". Principal reliance is placed upon this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661 (1972). United States, Br. 58.

There can be no argument, and there is none, that the issue before this Court in *Oneida* was whether the Trial Court had *subject matter jurisdiction* under 28 U. S. C. 1331 and 1362. United States, Br. 59. Concededly there was, because the controversy arose under a federal statute. Indeed, it would appear the only basis for the Indian claim was an apparently plain violation by the State of New York of the Federal prohibition against conveyance of Indian land without the consent of the United States, contained in the Non-intercourse Act, 1

Stat. 137. But the United States goes further, and argues the case stands for the proposition that "federal common law", widely at variance with local law, as well as previously recognized federal law, must be applied to determine the issues of *this case.*

Unlike *Oneida,* all parties to the case at bar concede federal jurisdiction was properly invoked. Consequently, the issue here is not whether there is federal jurisdiction, but whether, once jurisdiction is invoked, the federal courts will look to local law in determining the rights to ownership of real property. There is nothing in *Oneida* to suggest that local property law, applicable to Indians and non-Indians alike, and not inconsistent with federal law, will be disregarded in the federal courts. In this vein, Justice Rehnquest, joined by Justice Powell, said,

> The federal courts have traditionally been inhospitable forums for plaintiffs asserting federal-question jurisdiction of possessory land claims. The narrow view of the scope of federal-question jurisdiction taken by the federal courts in such cases probably reflects a recognition that federal issues were seldom apt to be dispositive of the law suit. * * *

Oneida, supra, at 414 U. S. 683.

Petitioner's agree that the United States has a continuing interest in the rights of the Omaha Indian Tribe to its reservation lands. But this is not to say that the Federal Government's interest requires abrogation of well-established local property law, applicable to land owned by Indians and non-Indians alike. Indeed, until the Court of Appeals' decision in this case, federal law concerning accretion and avulsion was wholly consistent with local law. See, 78-161, Iowa, Br. 10-11, 25-26. In a comparable

case, *U. S. v. Oklahoma Gas Co.*, 318 U. S. 206 (1942), this Court said,

> The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State . . .

Id., p. 211.

The Government seeks to distinguish *U. S. v. Oklahoma Gas Co.* on the basis that the federal statute granting authority in that case to open and establish public highways included the phrase "in accordance with the laws of the State or Territory in which the lands are situated." United States, Br. 66. Nevertheless, the issue before the Court was whether Federal statutory authority to open and establish public highways also included the authority to erect electric transmission lines, and, in deciding it, this Court adhered to the time-honored rule that local law applies unless federal interests otherwise require.

The Government's policy arguments to support its contention that federal interests require application of "federal common law", United States, Br. 67-71, are both strained and inapplicable to the circumstances of the case at bar. The Trial Court's judgment will not cut off the Omaha Indian Tribe's access to the Missouri River. It will not deprive it of farming, hunting or fishing land which it possessed at any time during the past century, until it forcibly occupied the disputed land with the aid of the Bureau of Indian Affairs in 1975. And the fact

that the Tribe might be deprived of 2,900 acres which it *claims* to own in this case, plus an additional 8,000 acres it *claims* to own in a related case, begs the questions of whether its claims are valid, and according to what law they should be determined. Surely a bare assertion of ownership by an Indian Tribe does not constitute a federal interest sufficient to override long and well-established local property law, as well as previously recognized federal law.

C. Federal law concerning interstate boundaries is inapplicable to this case.

The Government's argument that this case should be decided according to federal common law governing interstate boundaries is equally strained. It is well to remember that disputes involving interstate boundaries present unique choice of law problems. As this Court said in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977),

> . . . If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. (Citations omitted.)

In disputes between sovereign states over their common boundaries, the only appropriate law is federal law. But in the case at bar there is no dispute over the common boundary between Iowa and Nebraska. Much less is there any conflict in the laws of the two states on this subject. (As discussed in Iowa's Brief, pp. 9, 20-21, any possible conflict was resolved by the Trial Court in favor

of the respondents.) And notwithstanding the Government's attempt to analogize the aspects of sovereignty enjoyed by Indians while residing on reservations to the sovereignty of States, United States, Br. 74-75, a crucial difference remains: Indian "sovereignty" relates to their *internal* affairs. Until the Eighth Circuit's decision in this case, no court has held that Indian Reservation land is so sacrosanct that portions of it may not be washed away in the same manner that land belonging to other property owners, including the State of Iowa, may be washed away.

The Court of Appeals reliance upon *Veach v. White*, 23 F. 2d 69 (9th Cir. 1927) and *Ulhorn v. U. S. Gypsum Co.*, 366 F. 2d 211 (8th Cir. 1966) is misplaced. Both cases involved "pressing back" state boundaries. The Court in *Ulhorn* said,

> Thus, we are convinced that no established rule requires or even permits a change in the state boundary here. If it were necessary to adopt a new rule or law, it should favor the continuation of the long existence of the state boundary rather than a change therein.

And neither *Veach v. White* nor *Ulhorn* support the Court of Appeals' broad conclusion that "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion . . ." App. A 38-39.

The Government also argues that under Sections 2 and 3 of Iowa-Nebraska Boundary Compact, and this Court's decision in *Nebraska v. Iowa*, 406 U. S. 117 (1972), the respective states are obligated to recognize title to land affected by the boundary change in 1943. The Government further argues that *if* these cases were litigated prior to 1943, they *might have involved* a determination of the boundary between Iowa and Nebraska, so that federal law would apply. United States, Br. 73-74. Apparently the Government argues from this that it is now necessary to go back to 1943, determine what title the Omaha Indian Tribe had to the disputed land at that time, according to Federal law, and proceed accordingly.

This speculative argument ignores the fact that the most the Tribe would have been entitled to do would have been to present proof of title "good in Nebraska" according to Nebraska law.[7] And, since this case was litigated in 1976, it could not involve "pressing back" an interstate boundary. The reasons for applying "federal common law" relating to interstate boundaries do not exist in this case.

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7 This Court, in *Nebraska v. Iowa*, held that riparian land north of Omaha, including the land here in issue, was formed after 1943, and as to that land, "claimants of title to these areas as against Iowa may also have the opportunity to show title 'good in Nebraska' on the Compact date, July 12, 1943 . . ." *Id.*, at 406 U. S. 125. Study of the opinion shows this Court was speaking of titles good according to Nebraska law, which differs from Iowa law in a number of respects, including private riparian ownership to the thread of the stream, and titles obtained by adverse possession without requirement of a record title. *Id.*, at 406 U. S. 123. The Omaha Indian Tribe had the benefit of these differences between the laws of Iowa and Nebraska when the Trial Court adopted Nebraska law in deciding this case.

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CONCLUSION

Long standing and fundamental principles of federalism have been violated in this case, as well as the plain terms of the Tenth Amendment. Within living memory the land in issue has always been on the west bank of the Missouri River within the State of Iowa. The Omaha Indian Reservation has always been on the west bank of the River, entirely within the State of Nebraska.

Based upon a clearly and concededly erroneous belief by Solicitor Kent Frizzell, of the U. S. Department of Interior, that the disputed land was cut off from the Omaha Reservation by a U. S. Corps of Engineers rechannelization project in the 1940's, App. 114, the Tribe, aided by the United States Bureau of Indian Affairs, forcibly occupied the land in 1975, and summarily dispossessed the owners, including the State of Iowa.

In the ensuing trial in the District Court, petitioners proved that land connected to the Omaha Indian Reservation in the same location, which extended into the flood plain of the wild and uncontrolled Missouri River, washed away, and was destroyed by the River a century ago; and the land in issue is new land, formed on the Iowa side of the River.

The Court of Appeals, extrapolating from two cases involving interstate boundaries, incorrectly fashioned new "federal common law", that "a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion." Such events would be difficult to prove on a day to day basis when they occurred. By

incorrectly applying 25 U. S. C. 194, the Court of Appeals cast upon the State of Iowa and the other petitioners herein the burden of proving they did not occur more than a century ago. This impossible task is not permitted, much less required, by any federal interest, statute, treaty or rule.

The Court of Appeals' decision should be reversed, and the Trial Court's judgment affirmed.

Respectfully submitted,

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